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5 **UNITED STATES DISTRICT COURT**
6 **DISTRICT OF NEVADA**
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8 WEEPING HOLLOW AVENUE TRUST,) Case No. 2:13-CV-00544-JCM-VCF
9 Plaintiff,)
10)
11 ASHLEY B. SPENCER, *et al.*,)
12 Defendants.)
13

ORDER

14 Presently before the court is defendant Wells Fargo Bank's ("defendant") motion to
15 expunge lis pendens. (Doc. # 6). Plaintiff Weeping Hollow Avenue Trust ("plaintiff") filed a
16 response in opposition (Doc. # 13), and defendant filed a reply (Doc. # 17).

17 Also before the court is defendant's motion to dismiss with prejudice. (Doc. # 9).
18 Plaintiff filed a response in opposition (Doc. # 15), and defendant filed a reply (Doc. # 19).

19 Also before the court is plaintiff's motion for summary judgment. (Doc. # 14). Plaintiff
20 filed the summary judgment against defendant First American Title Insurance Company. No
21 response has been filed even though the response date has elapsed.

22 Also before the court is plaintiff's motion to remand to state court. (Doc. # 16).
23 Defendant filed a response in opposition. (Doc. # 20).

24 Also before the court is plaintiff's emergency motion for temporary restraining order.
25 (Doc. # 21).

26 Also before the court is plaintiff's emergency motion for preliminary injunction. (Doc. #
27 22).

28 Also before the court is defendant's motion for hearing. (Doc. # 24).

I. Background

There are seven pending motions in this action. The oldest motion, the motion to expunge lis pendens, became ripe on April 29, 2013. Some motions, such as the emergency motion for preliminary injunction, are not currently ripe. The court finds that these motions turn on the same issue and facts. No further briefing is necessary as the current motions overlap and repeat the same arguments. The court will dispose of all motions in this order.

A. Factual Background

On November 24, 2008, Ashley Spencer (“Spencer”) purchased real property located at 9234 Weeping Hollow Avenue in Las Vegas.¹ The grant, bargain, and sale deed was recorded in Clark County, Nevada. On or about December 8, 2008, Spencer executed a deed of trust and note for \$166,961. Defendant Wells Fargo loaned plaintiff the money to purchase the property.

Sometime thereafter, Spencer failed to make two payment obligations: (1) Spencer failed to make her homeowner association fees (“HOA fees”); and, (2) Spencer defaulted under the note and deed of trust.

On March 3, 2010, a notice of delinquent assessment lien was properly recorded in Clark County for failing to pay the HOA fees. On June 28, 2010, a notice of default and election to sell under the homeowners association lien was properly recorded in Clark County. On February 24, 2011, a notice of foreclosure sale for being in default under a delinquent assessment lien was properly recorded in Clark County. On May 4, 2012, a second notice of foreclosure sale for being in default under a delinquent assessment lien was properly recorded in Clark County. On or about October 5, 2012, plaintiff purchased the property at the properly

¹ The court must lean heavily on the documents provided by defendant to understand the factual background. Plaintiff's complaint provides very few specific facts. The court judicially recognizes all of the following documents: the deed of trust, the note, notice of lien, notice of default, notice of sale, assignments, second notice of sale, substitutions, foreclosure deed, notice of default, state court orders. *See Intri-Plex Technology, Inc. v. Crest Group, Inc.*, 499 F.3d 1048, 1052 (9th Cir. 2007) ("A court may take judicial notice of matters of public record without converting a motion to dismiss into a motion for summary judgment as long as the facts are not subject to reasonable dispute.").

1 noticed foreclosure sale in accordance with NRS 116.3116 for approximately \$3,004. (Doc. # 1,
 2 compl. at ¶ 7).

3 The above referenced paragraph of facts pertains to the HOA fees. This paragraph of
 4 facts pertain to the deed of trust. On September 28, 2011, a corporate assignment of the deed of
 5 trust was properly recorded in Clark County, whereby MERS as nominee for PrimeLending
 6 transferred and assigned all beneficial interest in the note and deed of trust to Wells Fargo. On
 7 September 10, 2012, a substitution of trustee was properly recorded in Clark County, whereby
 8 Wells Fargo substituted National Default Servicing Corporation as trustee under the deed of
 9 trust. On December 12, 2012, a notice of default and election to sell under the deed of trust was
 10 properly recorded in Clark County based on Spencer's default on the December 2008 note.

11 Defendant Wells Fargo has scheduled a trustee sale on May 28, 2013.

12 *B. Procedural History*

13 Plaintiff filed the instant action in state court on February 8, 2013. The complaint seeks to
 14 quiet title and declaratory relief against defendants Wells Fargo, Spencer, and First American
 15 Title Insurance Company. Defendant Wells Fargo removed the action to federal court on March
 16 29, 2013.

17 In the short history of the case, the parties have filed the following motions: expunge lis
 18 pendens; motion to dismiss; motion for summary judgment; motion to remand; motion for
 19 preliminary injunction; emergency motion for a temporary restraining order; and a motion for a
 20 hearing. This motion will resolve all the following motions and dispose of the case.

21 **II. Remand**

22 *A. Legal Standard*

23 A complaint filed in state court may be removed to federal court if the federal court
 24 would have had original jurisdiction over the action had it been brought in federal court in the
 25 first place. 28 U.S.C. § 1441(a). This court has original jurisdiction, pursuant to 28 U.S.C. §
 26 1332(a), over suits between citizens of different states for which the amount in controversy
 27 exceeds \$75,000.

28 "The removal statute is strictly construed against removal jurisdiction." *Provincial*

1 *Gov't of Marinduque v. Placer Dome, Inc.*, 582 F.3d 1083, 1087 (9th Cir. 2009). “The
 2 defendant bears the burden of establishing that removal is proper.” *Id.*

3 “[O]ne exception to the requirement of complete diversity is where a non-diverse
 4 defendant has been ‘fraudulently joined.’” *Morris v. Princess Cruises, Inc.*, 236 F.3d 1061,
 5 1067 (9th Cir. 2001). “Joinder of a non-diverse defendant is deemed fraudulent, and the
 6 defendant’s presence in the lawsuit is ignored for purposes of determining diversity, ‘if the
 7 plaintiff fails to state a cause of action against a resident defendant, and the failure is obvious
 8 according to the settled rules of the state.’” *Id.* (quoting *McCabe v. General Foods Corp.*, 811
 9 F.2d 1336, 1339 (9th Cir. 1987)). “Further, the defendant is entitled to present the facts showing
 10 the joinder to be fraudulent.” *Id.* (internal citation omitted).

11 B. Discussion

12 Plaintiff seeks to remand to state court by arguing this court does not have diversity
 13 jurisdiction under 28 U.S.C. § 1332. Plaintiff argues that it is a citizen of Nevada and that
 14 defendant Spencer is a citizen of Nevada. Plaintiff argues that Spencer is a proper defendant
 15 because plaintiff is attempting to quiet title to the property and Spencer is the former property
 16 owner. Plaintiff also alleges that no defendant has not shown the amount in controversy
 17 exceeds \$75,000.

18 As an initial matter, defendant Wells Fargo has submitted properly authenticated
 19 documents that demonstrate the outstanding balance on the loan is \$161,625.48. Additionally,
 20 the assessor’s office values the property \$132,711. The amount in controversy easily exceeds
 21 the minimum requirement for diversity jurisdiction.

22 The court now turns to whether Spencer is a fraudulently joined defendant. She is.
 23 Plaintiff is attempting to quiet title and establish that its interest in the subject property is
 24 superior to that of Spencer. In plaintiff’s motion for remand, it rightly asserts that Spencer is the
 25 former owner of the property—*former*, being the operative word.

26 Plaintiff foreclosed on the property pursuant to NRS 116.3116 because of Spencer’s
 27 delinquency in paying the HOA fees and/or dues. Plaintiff’s complaint affirmatively states that
 28 it properly complied with all the requirements of NRS 116 and that the foreclosure was lawful

1 and proper. The complaint also fails to allege that Spencer is, or has even threatened to, assert
 2 any interest or rights in the property. Plaintiff's proper foreclosure pursuant to NRS 116
 3 extinguished Spencer's rights or interest in the property. NRS 116.31166 states "[t]he sale of a
 4 unit pursuant [to this statutory scheme] vests in the purchaser the title of the unit's owner
 5 without equity or right of redemption." Finally, Spencer's statutory period of time, which could
 6 be 90 or 120 days depending on the circumstances, has expired. Spencer is a fraudulently joined
 7 defendant and is dismissed from the action. This court has original, diversity jurisdiction and
 8 denies the motion to remand.

9 **III. Injunctive Relief**

10 Plaintiff has filed two motions seeking injunctive relief.² The motion for a temporary
 11 restraining order moves the court to enjoin the trustee sale scheduled by Wells Fargo for May
 12 28, 2013. The motion for preliminary injunction moves the court to enjoin Wells Fargo from
 13 conducting a trustee sale pending resolution of this lawsuit on the merits.

14 *A. Legal Standard*

15 According to Federal Rule of Civil Procedure 65, a court may issue a temporary
 16 restraining order when the moving party provides specific facts showing that immediate and
 17 irreparable injury, loss, or damage will result before the adverse party's opposition to a motion
 18 for preliminary injunction can be heard. Fed. R. Civ. P.65. The purpose of a temporary
 19 restraining order is to preserve the status quo before a preliminary injunction hearing may be
 20 held. Its provisional remedial nature is designed merely to prevent irreparable loss of rights
 21 prior to judgment. *Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1422 (9th Cir.
 22 1984). "Thus, in seeking a temporary restraining order, the movant must demonstrate that the
 23 denial of relief will expose him to some significant risk of irreparable injury." *Associated Gen.*
 24 *Contractors of California v. Coalition of Economic Equity*, 950 F.2d 1401, 1410 (9th Cir.
 25 1991).

26 A preliminary injunction is an extraordinary remedy never awarded as a right." *Winter*
 27

28 ² Plaintiff's emergency motion for a preliminary injunction and emergency motion for a
 temporary restraining order are actually identical documents.

1 *v. N.R.D.C.*, 555 U.S. 7, 24 (2008). The Supreme Court has stated that a plaintiff must establish
 2 that he can establish each of the following to secure an injunction: (1) a likelihood of success on
 3 the merits; (2) likelihood of irreparable injury if preliminary relief is not granted; (3) balance of
 4 hardships; and (4) advancement of the public interest. *Winter*, 555 U.S. at 20-24 (2008).
 5 Plaintiff must “make a showing on all four prongs.” *Alliance for the Wild Rockies v. Cottrell*,
 6 632 F.3d 1127, 1135 (9th Cir. 2011).

7 *B. Discussion*

8 The court finds that plaintiff does not have a likelihood of success on the merits. *See*
 9 section IV.B *infra*. Plaintiff’s argument is based on its foreclosure on the property pursuant to
 10 NRS 116.3116 because of Spencer’s delinquency in paying HOA fees and/or dues. Plaintiff
 11 argues that its foreclosure extinguished the bank’s first position deed of trust. As discussed
 12 more thoroughly in section IV.B, the plain language of the NRS 116.3116, the legislative history
 13 and intent of the statute, and a mountain of Nevada state and federal cases all hold to the
 14 contrary. Plaintiff does not have a likelihood of success on the merits. The motion for a
 15 preliminary injunction and the motion for a temporary restraining order are both denied.

16 **IV. Motion to Dismiss**

17 Defendant Wells Fargo has filed a motion to dismiss plaintiff’s complaint.

18 *A. Legal Standard*

19 A court may dismiss a plaintiff’s complaint for “failure to state a claim upon which relief
 20 can be granted.” Fed. R. Civ. P. 12(b)(6). A properly pled complaint must provide “[a] short
 21 and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P.
 22 8(a)(2); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While Rule 8 does not
 23 require detailed factual allegations, it demands “more than labels and conclusions” or a
 24 “formulaic recitation of the elements of a cause of action.” *Ashcroft v. Iqbal*, 129 S.Ct. 1937,
 25 1949 (2009) (citation omitted). “Factual allegations must be enough to rise above the
 26 speculative level.” *Twombly*, 550 U.S. at 555. Thus, to survive a motion to dismiss, a complaint
 27 must contain sufficient factual matter to “state a claim to relief that is plausible on its face.”
 28 *Iqbal*, 129 S.Ct. at 1949 (citation omitted).

1 In *Iqbal*, the Supreme Court clarified the two-step approach district courts are to apply
 2 when considering motions to dismiss. First, the court must accept as true all well-pled factual
 3 allegations in the complaint; however, legal conclusions are not entitled to the assumption of
 4 truth. *Id.* at 1950. Mere recitals of the elements of a cause of action, supported only by
 5 conclusory statements, do not suffice. *Id.* at 1949. Second, the court must consider whether the
 6 factual allegations in the complaint allege a plausible claim for relief. *Id.* at 1950. A claim is
 7 facially plausible when the plaintiff's complaint alleges facts that allows the court to draw a
 8 reasonable inference that the defendant is liable for the alleged misconduct. *Id.* at 1949.

9 Where the complaint does not "permit the court to infer more than the mere possibility
 10 of misconduct, the complaint has alleged, but it has not shown, that the pleader is entitled to
 11 relief." *Id.* (internal quotations and alterations omitted). When the allegations in a complaint
 12 have not crossed the line from conceivable to plausible, plaintiff's claim must be dismissed.
 13 *Twombly*, 550 U.S. at 570.

14 The Ninth Circuit addressed post-*Iqbal* pleading standards in *Starr v. Baca*, 652 F.3d
 15 1202, 1216 (9th Cir. 2011). The *Starr* court stated, "First, to be entitled to the presumption of
 16 truth, allegations in a complaint or counterclaim may not simply recite the elements of a cause
 17 of action, but must contain sufficient allegations of underlying facts to give fair notice and to
 18 enable the opposing party to defend itself effectively. Second, the factual allegations that are
 19 taken as true must plausibly suggest an entitlement to relief, such that it is not unfair to require
 20 the opposing party to be subjected to the expense of discovery and continued litigation." *Id.*

21 B. Discussion

22 Plaintiff's argues that it properly foreclosed on the property pursuant to NRS 116.3116
 23 because Spencer became delinquent and defaulted on her HOA fee obligations. Plaintiff argues
 24 that its foreclosure extinguished the interest of the bank's first position deed of trust. Plaintiff's
 25 complaint seeks to quiet title and declaratory relief. Defendant argues that an HOA foreclosure
 26 pursuant to NRS 116 does not extinguish a first position deed of trust. The court agrees with
 27 defendant.

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1 NRS 116.3116(2) states:

2 A lien under this section is prior to all other liens and encumbrances on a unit except:

3 . . .

4 (b) a first security interest on the unit recorded before the date on which the assessment
5 sought to be enforced became delinquent, or, in a cooperative, the first security interest
6 encumbering only the unit's owner's interest and perfected before the date on which the
7 assessment sought to be enforced became delinquent

8 The clear language of this statute states that an HOA's lien is prior to all other liens and
9 encumbrances secured by the property, except a first security interest on the property recorded
10 before the date on which the assessment became delinquent. In this case, Wells Fargo properly
11 recorded its deed of trust on December 8, 2008. The plaintiff HOA recorded its notice of
12 delinquent assessment lien on March 3, 2010. The bank's first position deed of trust was
13 recorded almost fifteen months prior to plaintiff HOA's lien.

14 Additionally, plaintiff is required to (1) produce a copy of the assessment lien upon
15 which the foreclosure was based and (2) allege that the assessment lien chronologically precedes
16 the deed of trust. *Centana v. Mortg. Elec. Registration Sys.*, no. 2:11-cv-02105-GMN-RJJ,
17 2012 WL 3730528, at *3 (D. Nev. Aug. 28, 2012). In this case, the complaint does not allege
18 that the assessment lien chronologically predates the deed of trust. The complaint could not
19 allege such a fact in good faith because the deed of trust was recorded almost fifteen months
20 prior to the assessment lien.

21 Also, relevant is NRS 116.3116(2)(c), which carves out a limited exception to NRS
22 116.3116(2)(b). Read in its entirety, NRS 116.3116(2)(c) states that an HOA's unpaid charges
23 and assessments incurred during the nine months prior to the foreclosure of a first position
24 mortgage continue to encumber the property after the foreclosure of the first position deed of
25 trust. This nine month period of unpaid charges is known as a "super priority lien." However,
26 the super priority lien does not extinguish the first position deed of trust.

27 NRS 116.3116(2)(c) states:

28 Liens for real estate taxes and other governmental assessments or charges against the

1 unit or cooperative. The lien is also prior to all security interests described in paragraph
2 (b) to the extent of any charges incurred by the association on a unit pursuant to NRS
3 116.310312 and to the extent of the assessments for common expenses based on the
4 periodic budget adopted by the association pursuant to NRS 116.3115 which would have
5 become due in the absence of acceleration during the 9 months immediately preceding
6 institution of an action to enforce the lien, unless federal regulations adopted by the
7 Federal Home Loan Mortgage Corporation or the Federal National Mortgage
8 Association require a shorter period of priority for the lien. If federal regulations
9 adopted by the Federal Home Loan Mortgage Corporation or the Federal National
10 Mortgage Association require a shorter period of priority for the lien, the period during
11 which the lien is prior to all security interests described in paragraph (b) must be
12 determined in accordance with those federal regulations, except that notwithstanding the
13 provisions of the federal regulations, the period of priority for the lien must not be less
14 than the 6 months immediately preceding institution of an action to enforce the lien.
15 This subsection does not affect the priority of mechanics' or materialmen's lines, or the
16 priority of liens for other assessments made by the association.

17 This subsection has already been interpreted by a court in this district. "NRS
18 116.3116(2)(c) creates a limited super priority lien for 9 months of HOA assessments leading up
19 to the foreclosure of the first mortgage, but it does not eliminate a the first security interest."

20 *Diakonos Holdings, LLC v. Countrywide Home Loans, Inc.*, no. 2:12-cv-00949-KJD-RJJ, 2013
21 WL 531092, at *3 (D. Nev. Feb. 11, 2013). "[T]he HOA may initiate a nonjudicial foreclosure
22 to recover delinquent assessments and the purchaser at the sale takes the property subject to the
23 security interest." *Id.*; see also *First 100, LLC v. Wells Fargo Bank, N.A. et al*, 2:13-cv-00431-
24 JCM-PAL.

25 The plain language of NRS 116.3116(2)(c) provides an HOA with two options: (1) the
26 HOA may initiate a non-judicial foreclosure to recover the delinquent assessments and the
27 purchaser at the sale takes the property subject to the security interest; or, (2) initiate a judicial
28 action to pursue the assessments. In this case, plaintiff HOA properly pursued option one, but

1 the proper of execution of option did not extinguish the security interest in the first position
2 deed of trust. Accordingly, plaintiff's claims for quiet title and declaratory relief fail as a matter
3 of law.

4 Additionally, defendant Wells Fargo has cited no fewer than seven Nevada state court
5 cases confirming this interpretation of the NRS 116 statutory scheme and the super priority lien.
6 Plaintiff has cited no cases in support of its position and states only that the Nevada Supreme
7 Court has not decided the issue. The court is unpersuaded the Nevada Supreme Court would
8 reach a different interpretation if it decide the issue.

9 **V. Summary Judgment**

10 Plaintiff has also moved for summary judgment against defendant First American Title
11 Insurance Company ("FATIC"). Plaintiff asserts that defendant FATIC appeared in a title
12 search of the subject property.

13 FATIC has not responded to plaintiff's motion even though the response deadline has
14 elapsed. However, plaintiff has attached as an exhibit to its summary judgment motion a
15 motion purporting to be filed by defendant FATIC in state court before removal to this court.
16 The FATIC motion filed in state court seeks Rule 11 sanctions against plaintiff for frivolously
17 and unnecessarily naming FATIC as a defendant in this case. In the motion, FATIC claims "no
18 right, title or interest in the Property which is the subject matter of this litigation." Defendant
19 FATIC also correctly points out that plaintiff's complaint does not assert that FATIC is, or
20 intends to, assert any interest in the subject property. Finally, defendant FATIC's motion points
21 out that it has a judgment against a person with an alias of Ashley E. Spencer. However, the
22 prior owner of the property in this litigation was Ashley B. Spencer. There is no evidence this is
23 the same person.

24 To the extent plaintiff is attempting to establish it has a superior right to the subject
25 property than defendant FATIC, then the motion is granted. However, this superior right against
26 defendant FATIC, who appears to have been unnecessarily named in this lawsuit, has no bearing
27 whatsoever on the superiority of interests between the plaintiff HOA and defendant Wells
28 Fargo.

1 **VI. Lis Pendens**

2 Plaintiffs have failed to state a cause of action. Therefore, the lis pendens recorded by
3 plaintiffs must be expunged pursuant to NRS 14.015(2) and (3).

4 **VII. Motion for Hearing**

5 The court finds that the legal issues in the present action would not have been aided by
6 oral argument. The motion is denied.

7 Accordingly,

8 IT IS HEREBY ORDERED, ADJUDGED, DECREED that defendant's motion to
9 expunge lis pendens (doc. # 6) be, and the same hereby, is GRANTED.

10 IT IS FURTHER ORDERED that defendant's motion to dismiss (doc. # 9) be, and the
11 same hereby, is GRANTED.

12 IT IS FURTHER ORDERED that plaintiff's motion for summary judgment (doc. # 14)
13 be, and the same hereby, is GRANTED consistent with the foregoing.

14 IT IS FURTHER ORDERED that plaintiff's motion to remand to state court (doc. # 16)
15 be, and the same hereby, is DENIED.

16 IT IS FURTHER ORDERED that plaintiff's emergency motion for a temporary
17 restraining order (doc. # 21) be, and the same hereby, is DENIED.

18 IT IS FURTHER ORDERED that plaintiff's emergency motion for a preliminary
19 injunction (doc. # 22) be, and the same hereby, is DENIED.

20 IT IS FURTHER ORDERED that defendant's motion for a hearing (doc. # 24) be, and
21 the same hereby, is GRANTED.

22 IT IS FURTHER ORDERED that the complaint be dismissed. The clerk of the court
23 shall enter judgment and close the case.

24 DATED this 24th day of May, 2013.

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UNITED STATES DISTRICT JUDGE